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No. 78-577

In the Supreme Court of the United States

OCTOBER TERM, 1978

SHANTILAL VALAND, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 26a-27a) is not reported. The original opinion of the Board of Immigration Appeals (Pet. App. 12a-21a), its opinion on rehearing (Pet. App. 22a-25a), and the decision of the immigration judge (Pet. App. 1a-11a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1978. Mr. Justice Brennan extended the

time for filing a petition for a writ of certiorari to October 9, 1978, and the petition was filed on October 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's application for adjustment of status to that of an alien lawfully admitted for permanent residence was properly denied.

2. Whether the decision of the court of appeals was improper because it was issued without oral argument and in the form of a judgment order summarily affirming the Board of Immigration Appeals.

STATUTES INVOLVED

8 U.S.C. 1182 provides in pertinent part:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *
>
> (14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 1153(a)(3) and (6) of this title, and to nonpreference immigrant aliens described in section 1153(a)(8) of this title;
>
> * * * * *
>
> (19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact;
>
> * * * * *

8 U.S.C. 1251 provides in pertinent part:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;
>
> (2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States;
>
> * * * * *

8 U.S.C. 1255 provides in pertinent part:

> (a) The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his

discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

* * * * *

STATEMENT

Petitioner, a native and national of India, entered the United States in 1972 as a visitor and was authorized to remain until January 15, 1976 (Pet. App. 13a). He remained in the United States beyond that date, without authorization (*ibid.*). In August 1976, he was brought before an immigration judge for a hearing on the question of his deportability under 8 U.S.C. 1251(a)(2). At the hearing, through counsel, petitioner sought to avoid deportation by applying under 8 U.S.C. 1255 for a discretionary adjustment of his immigration status from visitor to permanent resident alien. In support of his application, petitioner claimed that he was eligible for a non-preference immigration visa because of his certification by the Department of Labor as a secretary pursuant to 8 U.S.C. 1182(a)(14). The immigration judge denied the relief sought and ordered deportation (Pet. App. 10a-11a).

The immigration judge first found (Pet. App. 2a) that petitioner had overstayed his authorization to

remain in the United States and was thus deportable under 8 U.S.C. 1251(a)(2). Turning to petitioner's request for adjustment of status, the judge observed that there were numerous misrepresentations and inconsistencies in petitioner's explanation of his background and employment history. For example, in petitioner's application for a labor certificate he had claimed that he had been given an offer to earn $165 per week at an import-export firm as a secretary using an electric typewriter and dictation equipment. The immigration judge found, however, that the offer was made by petitioner's cousin to work at a brand new "Mama and Papa retail store" which had neither an electric typewriter nor dictation equipment, did not require any employees, and "certainly couldn't afford to pay anybody $165 a week" (Pet. App. 3a-4a). The evidence further showed that when petitioner entered the United States he represented that he was a farmer and that he was coming to visit his brother (Pet. App. 5a). In fact, his "brother" was the cousin who owned the import-export store (*id.* at 5a, 7a).[1] The immigration judge also noted that petitioner had worked for two other companies since entering the United States and that he had thereby broken his guarantee to the Immigration and Naturalization Service that he would not obtain employment while in the United States in a visitor status (*id.* at 6a-7a).

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[1] At another point, petitioner had represented that his occupation was "butcher" (*id.* at 7a).

On the basis of this evidence, the immigration judge found that petitioner was not a bona fide visitor (*id.* at 7a), that the job offer to him was not made in good faith (*id.* at 8a), and that petitioner had engaged in "substantial conniving" to avoid the requirements of the immigration laws (*id.* at 10a). The judge denied the application for adjustment of status on the ground that petitioner was ineligible for such relief because he had failed to show that the job for which he had been granted the labor certificate actually existed (*ibid.*). Alternatively, in view of petitioner's misrepresentations and misconduct, the immigration judge denied the application as a matter of discretion (*id.* at 10a-11a). The immigration judge then ordered petitioner deported pursuant to 8 U.S.C. 1251(a)(2) (*id.* at 11a).

Petitioner appealed to the Board of Immigration Appeals. The Board affirmed the decision of the immigration judge denying adjustment of status, both for ineligibility and on discretionary grounds (Pet. App. 19a-20a), but granted petitioner the privilege of voluntary departure in lieu of deportation (*id.* at 20a). Petitioner applied for reconsideration before the Board, which reaffirmed its prior decision (Pet. App. 22a-25a). The court of appeals affirmed by judgment order (Pet. App. 26a-27a).

ARGUMENT

1. a. In passing on an alien's application for adjustment of status to that of a person lawfully admitted for permanent residence, the Attorney General, acting through the Immigration and Naturalization Service, must determine whether the applicant is eligible for such relief and then decide whether the relief is warranted "in his discretion and under such regulations as he may prescribe." 8 U.S.C. 1255(a). Where adjustment of status is denied in the discretion of the Attorney General, the burden of demonstrating an abuse of discretion is on the applicant. See *Thomaidis* v. *INS*, 431 F.2d 711 (9th Cir. 1970), cert. denied, 401 U.S. 954 (1971). Petitioner does not assert that this discretion was abused in this case; nor did he proffer substantial evidence showing that the discretionary decision denying adjustment was arbitrary or capricious. See *Tuan* v. *INS*, 531 F.2d 1337 (5th Cir. 1976).

One court of appeals has expressly ruled, and others offer support for the proposition, that an immigration judge's finding that an applicant was not a bona fide non-immigrant at the time of entry into the United States "without more would be sufficient to support discretionary refusal to grant adjustment of status under [8 U.S.C. 1255]." *Faddah* v. *INS*, 553 F.2d 491, 495 (5th Cir. 1977); see *Marino* v. *INS*, 537 F. 2d 686 (2d Cir. 1976); *Soo Yuen* v. *INS*, 456 F.2d 1107 (9th Cir. 1972); *Ameeriar* v. *INS*, 438 F.2d 1028 (3d Cir.), cert. dismissed, 404 U.S. 801 (1971); *Chen* v. *Foley*, 385 F.2d 929 (6th Cir. 1967), cert. denied, 393 U.S. 838 (1968). The immigration judge here found, among other things, that petitioner "was not a bonafide visitor" (Pet. App. 7a) and "did not intend to remain here as a visitor" (*id.* at 8a).

Those findings are supported by substantial uncontested evidence and justify the discretionary denial of adjustment of status.

b. Petitioner contends, however, that the order of the Court of Appeals for the Third Circuit in this case conflicts with the decision of the Court of Appeals for the District of Columbia Circuit in *Castaneda-Gonzalez* v. *INS*, 564 F.2d 417 (D.C. Cir. 1977). In *Castaneda-Gonzalez*, an alien was ordered deported on the ground that, while possessing a labor certificate from the Secretary of Labor, he was not qualified for the position specified in the certificate. The immigration judge concluded that the alien was excludable because he had entered the United States without meeting the requirements of the labor certification provision, 8 U.S.C. 1182(a)(14), and was therefore deportable under 8 U.S.C. 1251(a)(1). The court of appeals rejected this conclusion, holding that an alien who possesses a labor certificate issued by the Secretary of Labor could not be deported for violation of 8 U.S.C. 1182(a)(14), although he would be excludable under 8 U.S.C. 1182(a)(19), and therefore deportable under 8 U.S.C. 1251(a)(1), on a showing of willful and material misrepresentation. 564 F.2d at 422-425, 434.

The petitioner in this case was not ordered deported under 8 U.S.C. 1251(a)(1) for possessing a false labor certificate under 8 U.S.C. 1182(a)(14). Petitioner was found deportable under 8 U.S.C. 1251(a)(2) for overstaying his visitor's visa. The validity of his labor certificate was considered only with respect to his application for adjustment of status,

which was denied on discretionary grounds as well as for ineligibility. The decision in *Castaneda-Gonzalez* is thus inapposite. "To prove overstay, the respondent need only show a nonimmigrant's admission for a temporary period, that the period has elapsed, and that the nonimmigrant has not departed. Any fraud or misrepresentation at time of entry is irrelevant to the charge of overstay * * *." *Milande* v. *INS*, 484 F.2d 774, 776 (7th Cir. 1973). There is no dispute in this case that petitioner was granted authorization to remain in the United States only until January 15, 1976, and that he remained in this country beyond that time. Deportation for overstaying the time permitted in petitioner's visitor's visa was therefore appropriate.

c. We note additionally that while the immigration judge did not specify this ground as a basis for deportation in this case, he made all the necessary findings to support a determination of willful and material misrepresentation to induce entry that would justify exclusion of petitioner pursuant to 8 U.S.C. 1182(a)(19). Aliens who have procured a visa or other documentation of entry by fraud or misrepresentation are ineligible for admission under 8 U.S.C. 1182(a)(19) and are thus subject to deportation under 8 U.S.C. 1251(a)(1). The immigration judge determined that petitioner had engaged in "substantial conniving" (Pet. App. 10a) with respect to the immigration laws and that the job offer on which his labor certificate was based not only "was not made in good faith" but "was for a job which did not exist" (*id.* at 8a). These findings, which are not chal-

lenged by petitioner, constitute proof of willful and material misrepresentation amounting to fraud. See, *e.g.*, *United States* v. *Van Drunen*, 501 F.2d 1393 (7th Cir.), cert. denied, 419 U.S. 1091 (1974). By not formally declaring petitioner ineligible under 8 U.S.C. 1182(a)(19), however, the immigration judge followed the general rule that where a discretionary decision is authorized, a finding of statutory ineligibility is unnecessary. As this Court stated in *INS* v. *Bagamasbad*, 429 U.S. 24, 25-26 (1976) (per curiam; citations omitted):

> As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach. Here, it is conceded that respondent's application would have been properly denied whether or not she satisfied the statutory eligibility requirements. In these circumstances, absent an express statutory requirement, we see no reason to depart from the general rule and require the immigration judge to arrive at purely advisory findings and conclusions as to statutory eligibility.

2. Petitioner contends (Pet. 13) that the court of appeals acted improperly in failing to grant oral argument and in issuing a judgment order without specifying the reasons for its decision. In an administrative context, this Court has held that "[c]ertainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised." *FCC* v. *WJR, The Goodwill Station*, 337 U.S.

265, 276 (1949). See also *NLRB* v. *Local 42, International Association of Heat and Frost Insulators*, 476 F.2d 275, 276 (3d Cir. 1973) (en banc). Similarly, this Court has concluded "that the courts of appeals should have wide latitude in their decisions of whether or how to write opinions" and that "[t]hat is especially true with respect to summary affirmances." *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972) (per curiam). See *NLRB* v. *Amalgamated Clothing Workers of America*, 430 F.2d 966 (5th Cir. 1970). The Third Circuit judgment order recites that it was issued "[a]fter consideration of the contentions raised" (Pet. App. 27a). Petitioner fails to suggest any basis for a conclusion that more was required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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